

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PAUL FAZZINI,

Petitioner,

vs.

SHERIFF THOMAS HAYES, et al.,

Respondents.

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Case No. 3:03cv389

JUDGE WALTER HERBERT RICE

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE JUDGE (DOC. #29) IN THEIR
ENTIRETY; PETITIONER'S OBJECTIONS TO SAID JUDICIAL FILING
(DOCS. #31 AND #32) OVERRULED; CAPTIONED CAUSE DISMISSED
FOR WANT OF JURISDICTION; JUDGMENT IS TO ENTER
ACCORDINGLY; DIRECTIVE TO UNITED STATES MARSHALS SERVICE;
MOTION TO EXPEDITE (DOC. #44) AND MOTION FOR IMMEDIATE
RELIEF (DOC. #49) DEEMED MOOT; TERMINATION ENTRY

The captioned cause has been pending for an inordinate amount of time, following the Magistrate Judge's Report and Recommendations (Doc. #29), filed April 14, 2004, recommending that the captioned cause be dismissed, without prejudice, for lack of exhaustion of administrative remedies. The delay was caused by this Court's conclusion, seconding that of the Magistrate Judge, that the crucial question is whether the Petitioner was in fact on parole when arrested in this District or whether he was on probation and, moreover, that the precise question

was squarely presented in the appeal then pending before the Seventh Circuit. The Court expected a decision from the Seventh Circuit by summer or, at the latest, mid-fall of 2004. Regrettably, the Seventh Circuit did not decide the issue, with finality, until the Petitioner's Motion for Rehearing was denied on July 26, 2005. United States v. Paul Fazzini, 414 F.3d 695 (2005). That appellate court held, *inter alia*, that Fazzini was on parole at the relevant time and, accordingly, under the exclusive control of the United States Parole Commission, rather than on probation. Moreover, the Seventh Circuit concluded that the question of whether the collection of DNA was an unconstitutional condition of future probation had to be addressed by the Parole Commission.

Accordingly, pursuant to the principles of *res judicata/collateral estoppel*, this Court concludes both that the Petitioner Fazzini was on parole and under the exclusive control of the United States Parole Commission at and during the relevant period of time. Any appeal from the decision finding Defendant in violation of the conditions of his mandatory release/parole must be to the National Appeals Board, not to this Court.

WHEREFORE, based upon the aforesaid, this Court adopts the Report and Recommendations of the United States Magistrate Judge that the captioned action be dismissed, without prejudice, for lack of exhaustion of administrative remedies. Petitioner's Motion to Expedite (Doc. #44) and Motion for Immediate Relief

(Doc. #49) are rendered moot. Judgment is to enter accordingly.

The Petitioner has been maintained in the Southern District of Ohio, pending this Court's decision on the Magistrate Judge's Report and Recommendations. It is the Order of this Court that the United States Marshals Service, forthwith, return the Defendant to his designated institution.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/s/ Walter Herbert Rice

September 22, 2005

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

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WHR/slc